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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, ET AL., APPELLANTS,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

(Filed pursuant to Rule 12.)

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Section 344(*a*), provides as follows:

> "SEC. 237 (*a*). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, as amended by the Act of April 26, 1928, Chapter 440, 45 Stat. 466 (United States Code, Title 28, Section 861(*a*) and 861(*b*), provides as follows:

> "SEC. 861(*a*). The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

"SEC. 861(*b*). The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Statute the Validity of Which is Involved.

The statute, the validity of which is involved, is "Chapter 162 of the Laws of Nebraska, 1931, and Special Session, 1931"; commonly known as the Nebraska Standard Bread Loaf Law, and is as follows:

"SECTION 1. It shall be the duty of the department of agriculture to enforce all provisions of this act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this act.

"SECTION 2. Every loaf of bread made for sale in the State of Nebraska shall be of the following weights avoirdupois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf, provided that a twin one and one-half pound loaf may be made and sold, but units of said loaf must not be sold separately: Provided that none of the provisions of this act shall apply to fancy breads.

"SECTION 3. The Secretary of Agriculture shall prescribe reasonable tolerances or variations in excess, but not under the weights mentioned in the preceding section, within which all loaves shall be baked, and also the time for which said weights shall be maintained.

"SECTION 4. Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

Pursuant to Section 3 of said statute, the Deputy Secretary of Agriculture, no Secretary of Agriculture having been appointed, on June 24, 1931, adopted certain rules and regulations which are set forth in Appendix "X" attached hereto.

During the pendency of this action and while the restraining order herein was in effect, restraining the defendants, their agents and employees, from enforcing said statute and rules, the Deputy Secretary of Agriculture, on September 19, 1931, adopted new rules and regulations which are set forth in Appendix "Y" attached hereto.

C.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 2nd day of March, 1933 (R.* 65), and a motion for rehearing thereon was denied on the 13th day of May, 1933 (R.* 83).

* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Nebraska, and on file with the clerk of this Court. The record has not yet been printed.

The application for appeal was presented on the 1st day of June, 1933 (R. 87).

D.

Nature of Case and Ruling Below.

The 1931 Legislature of the State of Nebraska enacted a statute commonly known as the Nebraska Standard Bread Loaf Law and which is "Chapter 162 of the Laws of Nebraska, 1931, and Special Session, 1931", and which is set forth *verbatim* in Paragraph "B" hereof.

This statute was duly approved by Charles W. Bryan, as Governor of the State of Nebraska on April 21, 1931, and under the Constitution of Nebraska would have become effective ninety days after adjournment of the Legislature of Nebraska. This made the effective date of the statute August 2, 1931, had not the operation thereof been restrained by this action.

Pursuant to this statute the Deputy Secretary of Agriculture, no Secretary of Agriculture having been appointed, on June 24, 1931, ruled that a maximum tolerance of one ounce on half-pound loaves, and two ounces on pound loaves and 10% on all larger loaves should be allowed. That the weight should be determined by averaging the weight of not less than five loaves of a given lot "if available", and that the tolerance should apply for a period of twelve hours after baking.

On July 23, 1931, plaintiffs (appellants) filed a petition in the District Court of Lancaster County, Ne-

braska, attacking the statute and rules and regulations issued and asking an injunction against Charles W. Bryan, as Governor of the State of Nebraska, and Dwight F. Felton, as Deputy Secretary of the Department of Agriculture of the State of Nebraska, the officials charged with the enforcement of said statute (R. 3). The basis of the petition is that the statute and the rules and regulations issued thereunder are contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that:

1. A maximum tolerance over the weights fixed by the statute, rules and regulations is arbitrary, discriminatory and void, serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, is not calculated to effectuate that purpose and subjects bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

2. The unlimited power vested by the statute in the Secretary of Agriculture, a ministerial officer, to prescribe excess tolerances, to fix the time for which weights must be maintained, and to define "fancy breads", is unreasonable and arbitrary.

3. The provisions of the statute, rules and regulations with respect to the time, place, possession and particular loaves of bread required to comply with the statute, subjects the plaintiffs (appellants) to a fine for violation of the statute irrespective of any negligence on their part and is an unreasonable and arbitrary restriction upon their right to do business.

4. That the statute and the rules and regulations adopted thereunder provide tolerances which are impossible of performance, and arbitrarily require the maintenance of loaves of bread within this tolerance for an impossible length of time.

5. That the term "fancy breads" used in the statute, rules and regulations, which describes no known commodity, and the provisions of the statute prohibiting the manufacture (but not the sale) of a loaf of bread differing from the standard weights, and the failure of the statute, rules and regulations to define the crime of manufacturing over-weight bread are not sufficiently explicit to inform plaintiffs (appellants) what condition will make them liable to the penalties of the statute, are so vague that men of common intelligence must of necessity guess at their meaning and lack the definiteness and certainty required of penal statutes creating a new offense.

6. That the statute and rules and regulations prevent the baking of a twenty-ounce loaf of bread which is a popular and economical loaf, and that the barring of this loaf is an arbitrary and unreasonable restriction on plaintiffs' (appellants') right to do business.

On July 23, 1931, the court issued a temporary restraining order against defendants, their agents and employees. Defendants filed no answer on August 24, 1931, the date when the answer was due. Plaintiffs' testimony was taken in the case on September 22, 1931 (R.* Vol. 2). Then on September 30, 1931, defendants filed an answer (R.* 40) admitting the corporate existence of the plaintiffs, the official capacity of the

defendants, the passage of the statute, the intention of defendants to enforce the statute, that there was no Secretary of Agriculture in Nebraska, and the fact that the statute prohibited a twenty-ounce loaf of bread; denied the other allegations in the petition, and set up that on September 19, 1931, while the restraining order in this case was in effect that the defendant, Deputy Secretary of Agriculture, had adopted without notice some changed or additional rules and regulations which are attached to said answer as an exhibit and by reference made a part thereof (R.* 42).

Plaintiffs' (appellants) reply challenged the constitutionality of the statute itself and both sets of rules adopted by the Deputy Secretary of Agriculture, and the right of the Deputy Secretary of Agriculture to adopt new rules when a restraining order was in force against him (R.* 43).

By stipulation the evidence presented to the court consisted of the same evidence as in the case of *Jay Burns Baking Company et al.* v. *Charles W. Bryan, as Governor, et al.*, 264 U. S. 504, and the same evidence as in the case of *P. F. Petersen Baking Company et al.* v. *Arthur J. Weaver, as Governor of Nebraska, et al.*, together with the depositions of witnesses relating to the present statute and the oral testimony of certain witnesses concerning the unknown meaning of "fancy breads".

On the 30th day of January, 1932, the District Court of Lancaster County upheld the constitutionality of the statute, rules and regulations issued thereunder and denied the injunction (R.* 45). Motion for new trial was filed, overruled, and an appeal was taken to the Supreme Court of Nebraska.

On March 2, 1933, the Supreme Court of Nebraska affirmed the decision of the District Court of Lancaster County (R. 65), and on the 13th day of May, 1933, the Supreme Court of Nebraska overruled plaintiffs' motion for rehearing (R. 83).

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504.

Fiske v. *Kansas*, 274 U. S. 380, 47 Sup. Ct. Rep. 655.

John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100, 48 Sup. Ct. Rep. 489.

Sultan Railway & Timber Co. v. *Dept. of Labor & Industries*, 277 U. S. 135, 48 Sup. Ct. Rep. 505.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 50 Sup. Ct. Rep. 338.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237(*a*) of the Judicial Code as amended by the Act of February 13, 1925 (United States Code, Title 28, Section 344(*a*)), and as further amended by the Acts of January 31, 1928, and April 26, 1928.

Respectfully submitted,

JOHN C. GROVER,
HAROLD D. LEMAR,
Counsel for Appellants.

APPENDIX "X".

Rules and Regulations Governing the Enforcement of the Standard Bread Loaf Law.

1. Every bakery must be properly lighted, drained, plumbed and ventilated and conducted with strict regard to the influence of such conditions upon the health of all persons therein employed.

2. The floors, side walls, ceilings, furniture, receptacles, implements and machinery of every bakery and all cars, trucks and vehicles used in the transportation of all bakery food products shall be at no time kept in an unclean, unhealthful and/or unsanitary condition.

3. All trucks, trays, boxes, baskets, buckets and other receptacles, chutes, platforms, racks, tables, shelves and all knives, saws, cleavers, and other utensils and machinery must be thoroughly cleansed daily and the clothing of operatives, employees, clerks or other persons therein employed must be clean.

4. The side walls and ceilings of every bakery shall be brick, cement, plastered, wainscoted or ceiled with metal or lumber and shall be oil painted or kept well lime washed and all interior wood work in every bakery shall be kept well oiled or painted with oil paints or lime washed and kept clean and every building, room, basement or cellar shall have an impermeable floor made of cement or tile laid in cement, brick, wood or other suitable non-absorbent material which can be flushed and washed clean with water.

5. The doors, windows and other openings of every bakery shall, during the fly season, be fitted with self-closing screen doors and wire window screens of not coarser than fourteen mesh wire gauze.

6. Every bakery must have convenient toilet or toilet rooms separate and apart from the bakery. The floors of such toilet rooms shall be of cement, tile, wood, brick or other non-absorbent material and shall be kept in a thoroughly clean and sanitary condition. Such toilets shall be furnished with separate ventilating flues, or pipes, discharging into soil pipes, or on outside of the building. Lavatories and wash rooms shall be supplied with soap, water and towels, and all persons employed in the bakery must before beginning work or after visiting the toilet wash their hands and arms thoroughly in clean water.

7. No person shall be allowed to live or sleep in any room of the bakery.

8. No person afflicted with any infectious, contagious, or venereal disease shall be permitted to work in any manner in any bakery.

9. Loaves of bread made for sale in the State of Nebraska shall only be of the sizes specified by law.

10. The name and the net weight of the bakery product must be clearly printed on the outside of the wrapper if wrapped previous to the time of sale.

11. Fancy bread, as defined by the Secretary of Agriculture of the State of Nebraska, shall not be considered as coming within the scope of the law.

12. Milk bread is the bread obtained by baking a wheat bread dough in which not less than one-third of the water ingredient has been replaced by milk or the constituents of milk solids in proportions normal for whole milk. It conforms to the moisture limitation for wheat bread.

13. Rye bread is the bread obtained by baking a dough which differs from wheat dough in that not less than one-third of the flour ingredients has been re-

placed by rye flour. It conforms to the moisture limitations for wheat bread.

14. Raisin bread is the bread obtained by baking wheat bread dough, to which have been added sound raisins in quantity equivalent to at least 3 ounces for each pound of the baked product and which may contain proportions of sweetening and shortening ingredients greater than those commonly used in wheat bread dough.

15. Weights shall be determined by averaging the weight of not less than five loaves of a given lot, of the same marking and manufacture, if available.

16. A tolerance of one ounce per half pound loaf; two ounces per pound loaf and 10% of all larger loaves of bread shall be allowed in excess of the minimum weight.

17. Tolerances shall apply for a period of twelve hours after baking.

APPENDIX "Y".

State of Nebraska, Department of Agriculture.

By virtue and under the authority of House Roll No. 51, Chapter 162, Session Laws of Nebraska for 1931, the following rules and regulations are hereby prescribed and promulgated:

I. The tolerance and/or excess variation in weight of bread baked for sale in Nebraska shall not exceed:

(*a*) One and one-half ounces for one-half pound loaves.

(*b*) Three ounces for one pound loaves.

(*c*) Four and one-half ounces for one and one-half pound loaves.

(*d*) Six ounces for two pound loaves.

(*e*) The same relative tolerance for loaves of larger size permitted to be sold under said Act.

II. Bread for sale in Nebraska shall be so made and baked that it will maintain after cooling its required minimum weight for not less than twelve hours under normal conditions. The baker of such bread, however, shall not be responsible for the maintenance of said minimum weight after delivering the same to a retail dealer or consumer, or to a transportation agency in Nebraska, for delivery to a retail dealer or consumer.

III. Weights shall be determined by averaging the weight of not less than five loaves, if available, of a given lot of bread of the same grade, size, and baking.

IV. These rules shall not apply to fancy breads.

V. These rules and regulations supersede all other rules and regulations heretofore made.

Dated this 19th day of September, 1931.

(Signed) DWIGHT F. FELTON,
Deputy Secretary of Agriculture.

(Signed) CHARLES W. BRYAN,
Governor.